TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]142

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

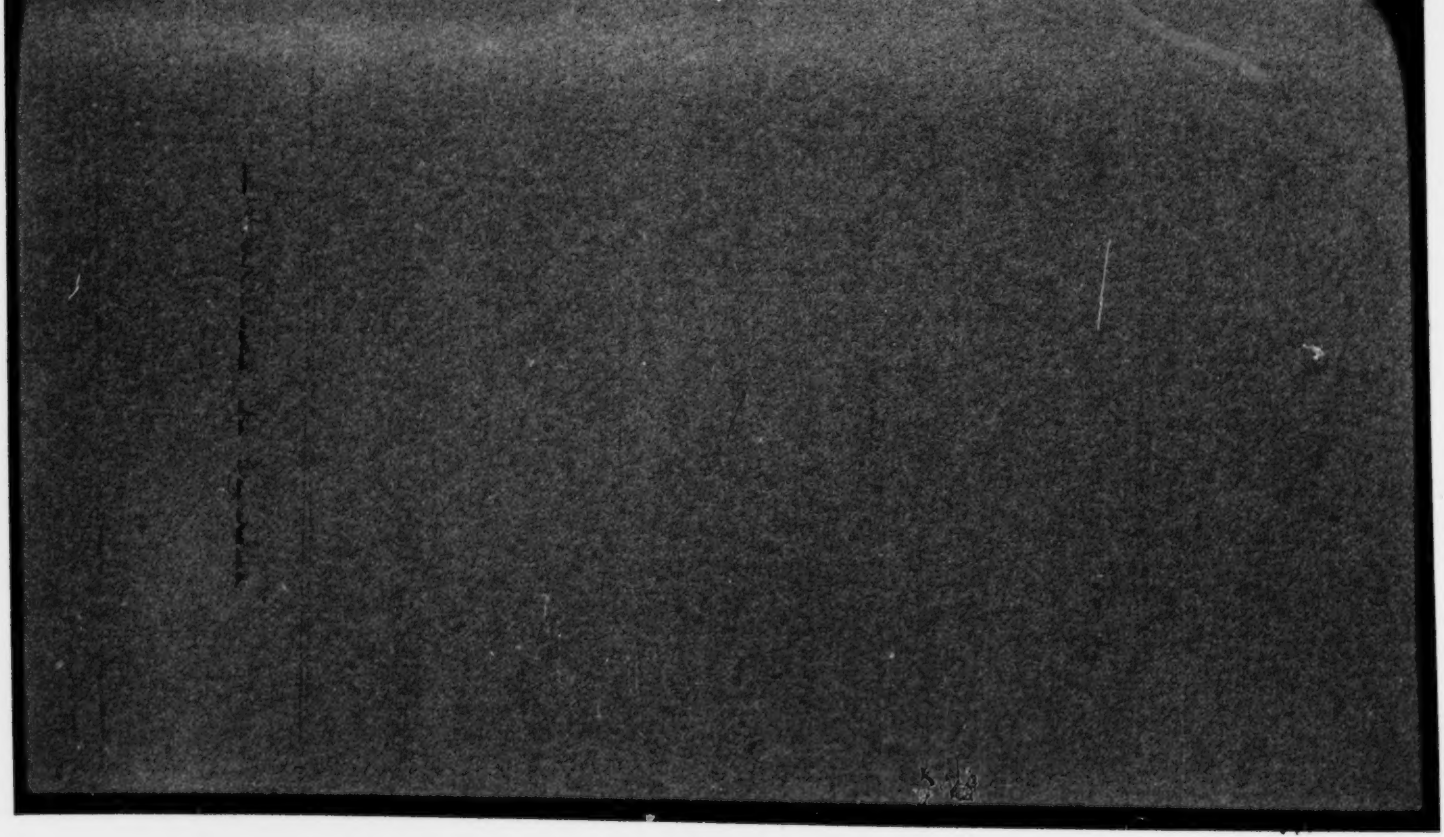
ELIZABETH VAN ZANT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PETITION FOR CERTIORARI FILED AUGUST 12, 1922.

CERTIORARI AND RETURN FILED NOVEMBER 16, 1922.

(23,418)



(28,418)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 463.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

ELIZABETH VAN ZANT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered that, heretofore, to-wit, on the 11th day of June, 1919, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, in a cause between Elizabeth (Goodrich) Van Zant, Respondent, and The Kansas City Southern Railway Company, Appellant, No. 21819, a certified transcript of the judgment of the Circuit Court of Jasper County, at Joplin, Missouri, and of the order of said circuit court granting an appeal from said judgment to the Supreme Court of the State of Missouri, which said transcript of said judgment and of said order granting an appeal is in the words and figures following, to-wit:

2 In the Circuit Court of Jasper County, Missouri, at Joplin, April Term, 1919.

STATE OF MISSOURI,
County of Jasper, ss:

Be it remembered, That on the 28th day of May, 1919, the same being the 37th judicial day of said term of said Court, among others, the following proceedings were had to-wit:

No. 24769.

ELIZABETH (GOODRICH) VAN ZANT, Plff.,

vs.

KANSAS CITY SOUTHERN RAILWAY CO., Deft.

Now at this day this cause comes on for trial, the plaintiff appears by Lee & Kenney and Hugh Dabbs, her attorneys, the Defendant by Cyrus Crane and Ray Bond, its attorneys, and both parties announce ready, waive a jury and submit this cause to the Court for trial. After hearing all the evidence and being fully advised in the premises the Court finds that the defendant is justly indebted to the plaintiff in the sum of Eight Thousand Dollars ($8,000.00) and that plaintiff is entitled to recover of and from the defendant that amount as her debt and damages herein.

It is therefore ordered and adjudged by the Court that the plaintiff have and recover of and from the defendant the said sum
3 of $8,000.00 the amount of debt and damages so found due by the Court as aforesaid together with the costs of this cause and that execution issue therefor.

And on the same day the further following proceedings were had in this cause, to-wit:

No. 24769.

ELIZABETH (GOODRICH) VAN ZANT, Plff.,

vs.

KANSAS CITY SOUTHERN RAILWAY CO., Deft.

Now comes the defendant and files herein its affidavit for an appeal, said affidavit being by the Court examined and deemed sufficient and appeal in this cause is granted to the Supreme Court of this State.

STATE OF MISSOURI,
County of Jasper, ss:

I, A. E. Taggart, Clerk of the Circuit Court within and for the County and state aforesaid hereby certify that the above and foregoing is a full, true and complete copy of the judgment and order granting an appeal in the cause therein named as fully as the same appears of record in my office.

Witness my hand and the seal of our said Court. Done at office in the City of Joplin, Missouri, this 31st day of May, 1919.

[SEAL.] A. E. TAGGART,
Clerk.

4 And thereafter, and on the 18th day of December, 1920, there was filed in said cause the Appellant's Abstract of the Record, which said abstract of the record is in the words and figures following, to-wit:

In the Supreme Court of Missouri, October Term, 1920. (January Call).

No. 21819.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Appeal from Jasper County Circuit Court.

Honorable Grant Emerson, Judge.

APPELLANT'S ABSTRACT OF THE RECORD.

This action was instituted in the Circuit Court of Jasper County, Missouri, at Joplin, by the filing of petition and issuance of summons thereon August 20, 1917. Amended petitions were filed, which are

not necessary to be reproduced or abstracted because no point is made in that regard. The case was tried on a duly filed third amended petition, which, omitting caption and signatures, is as follows:

5 *Third Amended Petition.*

Plaintiff, for her third amended petition, states that prior to the transaction complained of and set forth in this petition her name was Laura A. Goodridge, and that before said dates her former husband, —— Goodridge, having died, she intermarried with one —— Van Zant; that at the time of the transactions herein complained of her name was Laura A. Van Zant, but that she was often called and known as Elizabeth Goodrich; that the Elizabeth Goodrich mentioned in the petitions heretofore filed in this cause and the plaintiff, Laura A. Van Zant, is the identical and same person.

That the defendant, Kansas City Southern Railway Company is and was at all times herein mentioned, a corporation and as such was the owner of and operating a line of railroad as a common carrier of passengers in and through the County of Newton and State of Missouri; that on or about the 9th day of August, 1917, plaintiff was a passenger upon one of defendant's passenger trains operated by defendant over said line of railroad, and as such passenger was entitled to transportation over said road to her place of destination.

Plaintiff states that it became and was the duty of the defendant, as common carrier aforesaid, to well and safely carry and transport plaintiff and to deposit her in safety at her destination; but plaintiff says that defendant, unmindful of its duty in said premises and in violation of its contract and duty aforesaid to plaintiff as such passenger, failed to carry plaintiff well and safely and to deposit her in safety at her destination, but so carelessly and negligently

6 conducted itself in the premises that said train and the coach and car thereof in which plaintiff was riding and being carried was caused to be derailed and wrecked while plaintiff was a passenger thereon, as aforesaid, at a point on defendant's railroad about three miles north of the City of Neosho, in Newton County, Missouri, by reason of which plaintiff, without fault on her part, was by said carelessness, negligence and want of care of defendant, its agents, servants and employees in charge of its railroad and train, violently thrown from the seat in the coach in which she was riding upon and against a seat on the opposite side thereof, and from there to the floor of said car, thereby greatly bruising, hurting and injuring plaintiff in this, to-wit: plaintiff's body, back, spine and legs were bruised and severely injured, and that plaintiff's entire nervous system was permanently shocked and impaired as the result of said injuries, and that plaintiff was thereby severely injured internally and her internal organs, including peritoneum, bowels and stomach were severely injured, and plaintiff's peritoneum was thereby bruised, injured and inflamed, and as a result therefrom caused to be developed peritonitis resulting in the cæcum and ileum of the bowels being glued and stuck together thereby causing adhesions between the Fallopian tube and ovary to

the bowels on plaintiff's right side, and that by reason of such injuries and developments plaintiff was compelled to undergo a major and dangerous surgical operation, and have removed and taken out her Fallopian tube, ovary and appendix.

Plaintiff states that she was wholly dependent upon her own earnings for a livelihood and by reason of said injuries has lost
7 and will, in the future, lose a great amount of time and money; that prior to said injury she was in good health and capable not only of attending to her house work, but devoting all her time to the labor of cooking and work at hotels and other work; that on account of said injury and said operation she has since been and is now unable to perform her household work or perform labor in and about the house and work for other people; that she is unable to walk except with great pain and trouble; that she has suffered great pain and mental anguish on account of said injuries, and that said injuries are permanent and that she will continue to suffer great pain therefrom in the future; that she has been subjected to and incurred great expense and obligations for medical and surgical treatment and operations, hospital and nursing fees, and for medicines, as above stated, in an effort to heal and relieve said injuries and will in the future be compelled to expend large sums for medical treatment and attention, and that by reason thereof plaintiff has been damaged in all in the sum of Twenty-five Thousand Dollars.

That said train and coaches — so derailed and wrecked, and plaintiff's said injuries and damages were, as aforesaid, caused by reason of the carelessness and negligence of defendant, its agents, servants and employees, and by reason of said injuries and the result of the negligence and carelessness of defendant, its agents, servants and employees, as aforesaid, plaintiff has been damaged in said sum of Twenty-five Thousand Dollars, for which amount she is entitled to and prays judgment against defendant in this action, and for costs.

8 *Defendant's Answer.*

After various motions attacking the petition and other motions which are not necessary to be reproduced or abstracted, because no point is made with reference to same, the answer of defendant duly filed, omitting caption and signatures, was as follows:

Answer to Third Amended Petition.

Comes now the defendant in the above entitled cause, and for its answer to plaintiff's third amended petition, denies each and every allegation in said third amended petition contained.

Further answering said third amended petition, defendant states that the defendant above named is an interstate carrier of passengers and freight by rail; that at the time of the alleged injury to plaintiff mentioned in her third amended petition, plaintiff was riding on one of defendant's passenger trains on a free pass, or free transportation, issued to her under Article Five of the Federal Law known as the Interstate Commerce Act, which permits the issuance of said free

transportation to employees of railroad companies and their families; that at the time said pass was issued, a minor son of the plaintiff was an employee of the defendant and the plaintiff herein and her son were living together as a family, and said minor son of plaintiff was supporting, or assisting in the support of plaintiff; that said pass was issued on his account; was an interstate pass good between Pittsburg, in the State of Kansas, and Howe, in the State of Oklahoma; that said pass contained the following conditions, to-wit:

9 "The person accepting and using it, (the pass) thereby assumes all risk of accident and damage to person and baggage."

and also the following conditions:

"I also represent and declare that I am not prohibited by Federal or State law from receiving free transportation and this pass will be lawfully used."

Further answering defendant states that said pass being interstate, issued under the Federal law above mentioned, is to be interpretated and controlled in its effect and operation by decisions of the Federal Courts construing said Federal Act; that under said decisions the conditions on said pass above quoted are valid and binding on the plaintiff and by reason thereof, plaintiff having assumed all risk of accident and damage to her person is precluded and prevented from recovering damage on account of the matters and things, or any of them, alleged in her third amended petition.

Wherefore, having fully answered, defendant prays judgment and for its costs.

Reply.

Plaintiff's reply duly filed, omitting caption and signatures is as follows:

For reply to defendant's amended answer, plaintiff admits that defendant is an interstate carrier of passengers and freight by rail; admits that at the time of the alleged injury to plaintiff, mentioned in her amended petition, plaintiff was riding on one of defendant's passenger trains; admits that plaintiff was riding upon a pass

10 which was issued to her by defendant without pay and that said pass entitled plaintiff to passage on defendant's road between Pittsburg, Kansas, to Howe, in the State of Oklahoma, and that defendant's said road, over which plaintiff was riding on said pass, passed through the State of Missouri, and that it was while riding on said pass on defendant's said road in the County of Newton, State of Missouri, that plaintiff was injured on account of the negligence of said defendant , as alleged in plaintiff's petition.

Plaintiff alleges and states that at the time she received her pass she was residing in Pittsburg, in the State of Kansas, and that her son, who was a minor, under twenty-one years of age, was in the employ of defendant railroad and was living with plaintiff; that at said time plaintiff was working for wages at the Stillwell Hotel in

said city of Pittsburg, and had her home separate in said city and that her said son resided with her in said home. Plaintiff states that her said son while so employed by defendant, procured said pass for plaintiff, his mother, and that she paid no money or other valuable consideration therefor.

Plaintiff further states that in accepting said pass she did not and could not assume the risk of accident and damage to her person and baggage, caused by the negligence of defendant.

Plaintiff states that the provisions of sections 8483, 8476 and 8477, Article 3, Chapter 98, of the General Statutes of the State of Kansas, 1915, relating to railroad and other carriers, then in force in said state where said pass was issued, provided that all contracts, rules, regulations or devices whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from
11 any liability or damage created or caused by the acts, neglect or carelessness of such common carriers, shall be void. Plaintiff states that under said statute and under the common law then in force in Kansas, the alleged provision on the back of said pass, as set out in defendant's answer, was void and of no effect and against public policy, in that defendant was prohibited by said statute and by the common law of Kansas from entering into any such agreement or stipulation as a part of a contract of passenger carriage exempting it from liability for its negligence, and that as a gratuitous passenger, riding on a free pass, said contract being so in violation of said law did not and could not deprive plaintiff of her right to recover for her injuries, set out in plaintiff's petition, caused by the negligence therein pleaded.

Plaintiff further states that she received her injury, as set out in her petition, while riding on defendant's train in Newton County, Missouri. Plaintiff states that the laws of the State of Missouri, then in force, govern and control the provisions of the pass and transportation arrangement between plaintiff and defendant, and that the laws of said state in force at said time controlled and determined plaintiff's right to recover in this action, said action being commenced in the courts of said state and plaintiff's said action not being based upon any Federal Statute or any Federal law, but upon the common law liability in force in said state at the time, providing and holding that defendant is liable to plaintiff under the facts as stated in plaintiff's petition, for negligently and carelessly causing plaintiff's injury, as alleged in her petition. Plaintiff states that under the law of
12 the State of Missouri, then in force, the alleged provision and endorsement on the back of the pass, as pleaded in defendant's answer, providing that plaintiff assumed all risk of accident and damage to her person while riding on said train, under said pass, was void as against public policy and cannot be pleaded by defendant as a defense, in so far as the same (if it does) undertook to contract that defendant was not liable for its negligent acts causing damage to plaintiff, as alleged in her petition, while a passenger on defendant's said road.

Plaintiff states that this action was and is brought in the Circuit Court of Jasper County, Missouri, under the laws of the State of Mis-

souri, and that the defendant's liability to plaintiff and the validity of the alleged contract on the back of said pass is governed, as to its legality and effect, fully and wholly, by the laws of the State of Missouri, where said injury occurred and where said suit is brought and is to be tried.

Plaintiff states that under these facts the responsibility of the original decision in this case rests upon this court and the courts of the State of Missouri and not upon the United States District or Appellate Courts, and that the decisions and laws of the State of Missouri, above set forth, obtain and are the rule of action in this case, and that the rights of the parties are to be determined thereunder.

Plaintiff denies the allegation in defendant's answer, that the alleged provision in said pass is to be interpreted and controlled in its effect and operation by the decision of the Federal Courts construing said Act, and plaintiff denies that the provisions and conditions in said pass, which are in violation of the laws of the
13 State of Missouri, where said injury occurred, and of the State of Kansas, where said pass was issued, are valid and binding upon the defendant; and denies that plaintiff assumed or could assume any risk of accident or damage to her person, caused by the negligence of defendant, while riding on said train under said pass.

Plaintiff further denies each and every allegation in said answer contained not herein admitted or specifically denied.

Trial, Judgment and Subsequent Proceedings.

This case was tried at the April 1919, term of said Circuit Court of Jasper County, and the trial completed and judgment rendered by the court against the defendant on the 28th day of May, 1919. During the trial, for the purpose of shortening the proceedings and fixing the amount of damages, a jury was waived, by agreement of parties. Order to that effect duly entered, and the following stipulation made between the parties, offered in evidence and made part of the record:

Stipulation.

(Omitting Caption and Signatures.)

Without any concession by either party as to what the final judgment in this case should be, but solely for the purpose of shortening the trial and the introduction of testimony, it is agreed and stipulated as follows:

1. If the Court finds the issues in favor of the plaintiff, he
14 may fix her damages at Eight Thousand ($8,000.00) Dollars.

2. Plaintiff agrees not to remit any amount therefrom should judgment be in her favor.

3. Defendant agrees it will not (if judgment goes against it) either on motion for new trial or on appeal urge or claim that said amount is excessive.

4. Both parties agree that in fairness to them this stipulation should not in any wise be taken or used by the trial Court or any Appellate Court as an indication of how either party thinks or believes this cause should be or is going to be decided.

The Court found the issues in favor of the plaintiff and pursuant to said stipulation, entered judgment in her favor for the amount of Eight Thousand ($8,000) Dollars on May 28, 1919, at said April term. Record entry was duly made of said judgment. Thereafter during said term, and within four days after the rendition of the decision and judgment aforesaid, and on the 28th day of May, 1919, defendant duly filed its motion for new trial (said motion will appear in full at a subsequent page of this abstract and in the bill of exceptions). Defendant's said motion for new trial was heard by the court on the 28th day of May, 1919, at the same term of court, and was overruled, and record entry of such order of overruling the same properly made, and defendant duly excepted and saved its exception to the order overruling said motion.

15 *Bill of Exceptions and Appeal.*

The defendant was given until the 3rd day of September, 1919 term to file bill of exceptions. On that day which was September 17, 1919, the time for filing of bill of exceptions, by order duly entered by the court, was extended and on the 10th day of June, 1920, and within the time allowed and extended by the court, the defendant filed its bill of exceptions and the same was signed, sealed and mad a part of the record, by the Honorable Grant Emerson, Judge of Di vision Two, of the Jasper County Circuit Court. All pursuant to and in compliance with the requirements of law. Defendant taking all necessary, proper and legal steps thereunto, was allowed an appeal of this cause to the Supreme Court of Missouri, such appeal was duly taken and lodged in this court by filing herein within the time allowed by law, a certified copy of the judgment and order allowing appeal.

Bill of Exceptions.

The bill of exceptions was filed by defendant within the time allowed by the court duly and timely. In said bill of exceptions are preserved all of defendant's exceptions to adverse rulings of the court, on the admission and exclusion of evidence, giving and refusing of instructions or declarations of law, and its exceptions to the action and order of the court in overruling its motion for a new trial. In the following abstract of said bill of exceptions, all evidence
16 as to the injuries sustained by the plaintiff are omitted, in view of the stipulation agreeing as to the amount of damage in the event the finding of the court was for the plaintiff. The remaining evidence bearing on the question raised on this appeal, as appearing in said bill of exceptions, is as follows:

LAURA GOODRICH VAN ZANT, sworn as a witness on her own behalf, testified as follows:

Direct examination.

By Mr. Dabbs:

Q. You may state your name to the Court.
A. Laura Goodrich Van Zant.
Q. Your initials are Laura A. Van Zant?
A. Yes, sir.
Q. Are you the plaintiff in this case?
A. Yes, sir.
Q. You formerly lived in Pittsburg, Kansas?
A. Yes, sir.
Q. About when were you injured, Mrs. Goodrich?
A. On the 9th of August, 1917.
Q. Just about where?
A. Well I was injured in this side——
Q. I mean what locality?
A. Th-ee mile this side of Neosho, they told me.
Q. Know what county that is?
A. Well it is——

Mr. Crane: It will be admitted it is Newton County.
Mr. Dabbs: Newton County, Missouri.

Q. You were on the Kansas City Southern Railway Company passenger train?
A. Yes, sir.
Q. Where did you take that train?
A. Pittsburg, Kansas.
17 Q. What kind of a coach or car were you in?
A. Chair car.
Q. Know what time you left Pittsburg?
A. No I don't remember the exact time.
Q. Have you any idea whether day or night?
A. Yes, sir, in the morning.
Q. Before day-light?
A. No, it was after day-light.
Q. Where were you going, Mrs. Goodrich?
A. Well my pass was to Howe, Oklahoma, but I was going on to Holdenville to my brothers.
Q. You were leaving the state of Kansas and going through Missouri into Oklahoma?
A. Yes, sir.
Q. Did you have transportation?
A. Yes, sir.
Q. What was it?
A. Pass.
Q. Who got it for you?
A. My son.
Q. Where did he reside?
A. With me.

Q. In Pittsburg, Kansas?
A. Yes, sir.
Q. And he gave you the pass and what did you do with it, give it to the conductor?
A. Yes, sir, I guess so—the train employee; I don't know whether train auditor or conductor.
Q. Well you presented it on the train?
A. Yes, sir.
Q. Did you know the conductor?
A. No, sir.
Q. Just tell in your own language after you entered that train if anything happened to the train that caused you any disturbance or anything, tell the Court in your own language what it was and where.
A. Well the train was reported an hour late and of course I was sleepy when I got on the train and I went to sleep and I never knew until I fell over in the aisle and against the seat on the other side.
Q. You went to sleep while on the train in the chair car?
18 A. Yes, sir.
Q. The first thing you knew was what?
A. I fell and some one hollowed "There is a wreck," some man, a man's voice, and they walked on me in the aisle. I fell against a seat on the other side. There was no one sitting in the seat by me and I was sitting alone on the east side of the car. I went against the seat on the other side and then I fell backwards, and several walked on me in the aisle.
Q. Fell how?
A. Fell backwards. The train pitched farward.
Q. Then you fell backwards where?
A. Back into the aisle.
Q. You mean on the floor?
A. Yes, sir.

The remainder of plaintiff's testimony on direct examination deals entirely with her injuries.

Cross-examination.

By Mr. Bond:

Q. At the time of this accident you lived in Pittsburg, Kansas?
A. Yes, sir.
Q. A- what place?
A. 912 North Pine.
Q. How long had you lived there?
A. You mean in Pittsburg?
Q. Yes.
A. I think I had lived there about—let's see—I don't know exactly how long but a year or a little over.
Q. Who were you living with?
A. With my son, and I had some roomers, Doctor King and wife.
Q. That is the son that worked for the railway?

A. Yes, sir.
Q. What is his name?
A. John Goodrich.
Q. What kind of work did he do?
A. He had done most everything, but I think at the time he was working at machinist's helper.
19 Q. Know how much wages he was making?
A. No, sir.
Q. He was single?
A. Yes, sir.
Q. And you were single, that is, you had separated from Mr. Van Zant?
A. Yes, sir.
Q. You and your son lived at the time at the place you mentioned?
A. Yes, sir.
Q. He slept there?
A. Yes, sir.
Q. And ate his meals there?
A. Yes, sir.
Q. That was the home of both of you?
A. Yes, sir.
Q. He also helped pay the grocery bills?
A. He gave me his check at the end of each week and I spent it for all our bills.
Q. He gave you his check at the end of the week and you used that money toward keeping up the home?
A. Yes, sir.
Q. You lived there in that fashion and were at the time this trip was undertaken?
A. Yes, sir.
Q. And at the time this pass was given to you?
A. Yes, sir.
Q. Pass was issued to you on account of your son?
A. Yes, sir.
Q. At the time of the issuance of this pass and at the time of this trip, you and your son constituted your family in Pittsburg?
A. Yes, sir.
Q. He made the application for the pass?
A. Yes, sir.
Q. And it was issued under the name of Mrs. L. A. Goodrich?
A. Yes, sir.
Q. That was by reason of the fact that his name was Goodrich?
A. Yes. He didn't know but what mine was Goodrich. He thought after I and Mr. Van Zant separated I had gotten a divorce.
20 Q. You had gone under the name of Goodrich?
A. Always had.
Q. This pass was issued in that name?
A. Yes, sir.
Q. It was a pass in two parts, rather a long paper and perforated?
A. No, it was a little piece.

Q. It had two parts?
A. Yes, sir.
Q. And the conductor tore it in two and kept part of it and handed the other back?
A. Yes, sir.
Q. It was a round trip pass?
A. Yes, sir.
Q. He took the part for the going part and *and* handed you the returning portion?
A. Yes, sir.
Q. You still had that when the accident happened?
A. Yes, sir.
Q. Have you that now?
A. No, it was misplaced at the hospital.
Q. But you did have it at the time of the accident?
A. Yes, sir.
Q. And since that time have misplaced it in some way?
A. Yes, sir.
Q. Handing you Exhibit 1 I will ask you whether or not that is the part of the pass the conductor took up, that is the going part of the pass you rode on?
A. I don't know; I guess it is.
Q. That is the name the pass was issued in, Mrs. L. A. Goodrich?
A. Yes, sir.
Q. And that is the name of the son, dependent mother of J. M. Goodrich, those are the initials of the boy?
A. Yes, sir.
Q. Occupation: Flue borer from Pittsburg to Howe?
A. Yes, sir.
Q. You have misplaced the other part of the pass?
21 A. Yes, sir, but I thought it was blue instead of gray.
Q. You were going from Pittsburg to Oklahoma?
A. Yes, sir.
Q. The pass called for continuous trip from Pittsburg to Howe, Okla.?
A. Yes, sir.
Q. And you were going beyond that a little bit to Holdenville on another road?
A. Yes, sir.
Q. You got on the train at Pittsburg?
A. Yes, sir.
Q. Came on the road from Kansas into Missouri and the accident happened in Newton County, Missouri?
A. Yes, sir. I didn't remember the county.
Q. Well north of Neosho in Missouri?
A. Yes, sir.
Q. You had asked your son to get this pass for you?
A. Yes, sir.
Q. And he did that in compliance with your request?
A. Yes, sir.
Q. You were 33 years old at this time I believe you stated?

A. Just about.
Q. You had been married twice?
A. Yes, sir.
Q. Had you had any other children besides this boy?
A. No, sir.

The remainder of the cross-examination related to the matter of injuries.

Dr. A. L. CARPENTER, witness on behalf of plaintiff, testified entirely with regard to plaintiff's injuries.

At this point a jury was waived and plaintiff asked leave of court to amend the petition which was granted. The same was
22 amended and appears as the Third Amended Petition, and is set out in full in this abstract. The further trial of the case was continued until the next regular term of court, with the agreement that the testimony already taken remain in the record and be considered by the court in the further trial of the cause as testimony and evidence therein. At the next regular term of the court, the following occurred:

JOHN GOODRICH, sworn as a witness on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Dabbs:

Q. What is your name?
A. John Goodrich.
Q. How old are you?
A. 17.
Q. Where do you live?
A. Joplin, Missouri.
Q. Where do you work?
A. Eagle-Picher Lead Works.
Q. And you are the son of the plaintiff in this case?
A. Yes, sir.
Q. You live with her?
A. Yes, sir.
Q. Formerly lived in Pittsburg?
A. Yes, sir.
Q. You then worked for the Kansas City Southern Railroad Company?
A. Yes, sir.
Q. In what capacity?
A. Well, I worked at several. At the time I was working as flue borer in the round house.
Q. At the time your mother started on this contemplated visit to Howe, Oklahoma, were you working for the Kansas City Southern?
A. Yes, sir.

Q. And living with her in her home?
A. Yes, sir.
23 Q. What was your mother doing then; was she doing any kind of work?
A. Before she left she was working at the Stillwell Hotel three meals a day and was keeping house for me and doing the work at home.
Q. And you lived with her; that constituted the household, you and your mother?
A. Yes, sir.
Q. She was working at the Stillwell Hotel and keeping the house and you were working for the Kansas City Southern and taking the fruits of your labor and living on it?
A. Yes, sir.
Q. What was the condition of your mother's health and ability to get around and walk prior to the time she started on this trip?
A. She done all the work at the house, done her own washing and ironing and waited tables at the Stillwell Hotel.
Q. Do you know of any complaint or sickness or anything of the kind?
A. No, sir.
Q. You have been living with your mother since that, what do you say about her condition since that time?
A. Well, she isn't able to do any of her work to speak of now. I have to sweep all the floors and I have tried to do the washing, skinned up all of my knuckles trying to wash.

Mr. Crane: Move to strike out that answer as mere conclusion of the witness, what her ability is as an opinion.
The Court: Sustained.
Mr. Dabbs: Except.

Cross-examination.

By Mr. Crane:

Q. They call you "John." Is that your name?
A. Yes, sir.
Q. John, here is the application, this paper marked Exhibit 2, this is the application that you made for the transportation
24 for your mother, isn't it? That is your signature there?
A. Yes, sir, that is my signature.
Q. And this is your signature also on this little slip?
A. Yes, sir.

Mr. Crane: I want to introduce this in evidence.
Mr. Dabbs: Very well.

Said Exhibit 2, being in words and figures as follows, to-wit:

"8-4-17.

Mrs. L. A. Goodrich, age 38 yrs. is my mother Depending on me for support, living under the same roof.

J. M. GOODRICH.

Port Arthur Route.

K. C. S. R. R.

.....
(Insert Name of Railway Co.)

Employe's Application for Transportation.

8-4-1917.

W. H. Sagstelter,
M. M.:

Trip Pass, Card Pass.

If consistent, please furnish me transportation as indicated.
Half rate Refund.

For Mrs. L. A. Goodrich age 38 yrs. widow.
From Pittsburg to Howe, Okla., and return.
Via K. C. S. R. R.
Good until 9-4-17"

I hereby certify that the above named person is my dependent mother, a member of my family, residing with me, and entirely dependent upon me for support, (unemployed) and understand that the Interstate Commerce law permits issuance of Interstate transportation only to railroad employes and dependent members of their families, and that any person not entitled thereto under the law who uses free or reduced rate transportation is subject to a penalty of from $100.00 to $2,000.00 for each offense.

Name: J. M. GOODRICH.

Position—Flue borer.
Length of Service—2 mon's years.
Residence—Pittsburg, Kansas.
O. K.
W. H. SAGSTELTER.

Mr. Crane:

Q. Now after you had made that application who did you get the transportation from; who gave it to you, do you remember?
A. I don't remember.
Q. You don't remember how that came to you?
A. No, sir. I believe I went to the office and signed up for it.
Q. You got a pass for your mother. See if you recognize that as part of it? It was in two pieces, one going coupon and one return?
A. Yes, sir.
Q. That is the going coupon of that pass, that Exhibit 1?
A. Yes, sir.

Mr. Crane: All right. I offer that in evidence.

Said Exhibit 1, being in words and figures as follows:

26 "The Kansas City Southern Railway Company.

No. G34738.

Trip Pass.

Pass Mrs. L. A. Goodrich, account dep. mtr. J. M. Goodrich, flue borer, from Pittsburg to Howe.
Void if detached.
Issued by

A. M. CALHOUN."

Mr. Crane: Now, I offer in evidence the conditions printed on the back or reverse side of the pass on which plaintiff was riding at the time she was injured, which conditions are as follows, to-wit:

"Conditions.

Good for stop-over at will on application to Conductor.
This pass is not transferable, must be signed in ink by the holder thereof, and the person accepting and using it thereby assumes all risk of accident and damage to person and baggage.
Forfeited if presented by other than person named, and may be revoked without notice.
The above conditions are hereby agreed to.
I also represent and declare that I am not prohibited by Federal or State laws from receiving free transportation, and this pass will be lawfully used."

Mr. Dabbs: We object to the introduction of that agreement on the back of the pass for the following reasons: Because the agreement and conditions offered in evidence violate the laws of
27 the State of Missouri in force at the time of the accident or the alleged injury in that the agreement to the extent that it undertakes to relieve the defendant railroad company from liability for negligent acts is void under the laws of Missouri and against public policy and is also void—the conditions on the back of the pass are also void under the laws of the State of Kansas.
The Court: Objection overruled for the present.
Mr. Dabbs: Except.
The Court: The objection of the plaintiff to the introduction of the contract and agreement on the back of the free pass constitutes no defense in his case because void on the ground of public policy and under the law of Missouri, where the accident happened, and under the laws of Kansas, where the free pass was issued, is sustained, and said contract having been admitted in evidence during the trial, the Court reserving the right to pass upon this objection after the conclusion of the evidence and hearing of arguments, is now stricken out.
Mr. Crane: We except.

Thereupon the parties for the purpose of shortening the trial and the record as to evidence relating to extent of plaintiff's injuries, as alleged in amended petition and to dispense with further proof by either party on the subject of amount of damages, filed the following agreement relating to the question of amount of damages in said cause:

(This is the stipulation set out in the front part of this abstract) (at page——, agreeing that in the event the court should find for) (the plaintiff, her damages might be fixed at $8,000.)

28 This was all the evidence in the case except that relating to the plaintiff's injuries.

Thereupon, the defendant asked the Court to give the following declarations of law, which were by the Court refused, the defendant at the time duly excepting and now excepting to the action, ruling and refusal of the Court to give said declarations of law and each thereof, to-wit:

"A."

"The Court declares the law to be that under the law and evidence in the case, the finding must be in favor of the defendant and that plaintiff cannot recover." Refused.

"B."

The Court declares the law to be that if, at the time plaintiff was injured she was riding on one of defendant's passenger trains on an interstate trip between the states of Kansas ad Oklahoma, and that she was injured in the state of Missouri while on said interstate trip, and that plaintiff was, at that time riding on a free pass, good from Pittsburg, Kansas, to Howe, Oklahoma, and that said pass was issued to plaintiff by defendant on account of plaintiff's son being an employee of defendant, and that plaintiff was a member of the family of said son, and that said pass was an interstate free pass, then the stipulation on the back of said pass limiting the liability of defendant for any injuries which plaintiff might sustain while riding on said pass, was valid and binding and the plaintiff cannot recover and judgment must be in favor of the defendant. Refused.

29 Thereupon, during said regular term of Court, and on the said 28th day of May, 1919, the Court found the issues in favor of the plaintiff, and pursuant to stipulations of parties fixed her damages at $8,000.00, and rendered judgment in her favor and against defendant for that amount, which judgment was duly entered of record.

Motion for New Trial.

(Caption and Signatures Omitted.)

Now on this day comes the defendant The Kansas City Southern Railway Company and moves the Court to set aside the verdict and

judgment rendered in the said cause on the 28th day of May, 1919, and to grant the said defendant a new trial herein for the following reasons:

1. The verdict in said cause is against the evidence, against the weight of the evidence and against the law under the evidence.

2. The verdict was for the wrong party.

3. The court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff.

4. The court erred in rejecting competent, relevant and material evidence offered by the defendant.

5. The court erred in rejecting and refusing to admit in evidence in the case the stipulation and condition contained on the back of the pass upon which plaintiff was riding at the time she was injured, offered by the defendant.

6. The court erred in rejecting and refusing to admit in evidence the stipulations and conditions contained on the back of the pass, issued to plaintiff by defendant, upon which plaintiff was
30 riding at the time she was injured.

7. The court erred in refusing to give the declaration of law, in the nature of a demurrer to the evidence, numbered "A," requested by defendant at the close of all of the evidence.

8. The court erred in refusing to give declaration of law numbered "B" requested by the defendant.

9. The court erred in failing and refusing to follow the decisions and holding of the Federal Courts and of the Supreme Court of the United States and the law as declared by such Courts in determining the validity and effect of the stipulation and condition on the back of the pass upon which plaintiff was riding at the time she was injured, limiting and precluding liability on the part of defendant for injuries which might be sustained by plaintiff while riding on said pass.

Wherefore, this defendant prays that a new trial be granted herein.

Which said motion coming on to be heard was by the Court on the 28th day of May, 1919, and during said regular term of court, overruled, the defendant at the time duly excepting and now excepting to the action of the Court in overruling said motion.

Thereupon, on the 28th day of May, 1919, and during said regular term of court, the defendant filed its affidavit for an appeal in this cause, and an appeal was allowed by the Court to the Supreme Court of the State of Missouri, and defendant given until on
31 or before the third day of the September, 1919, Term of this court within which to file its Bill of Exceptions.

The Order of Record granting said appeal is as follows:

(Caption and Signatures Omitted.)

"Now comes the defendant and files herein its affidavit for an appeal, said affidavit being by the Court examined and deemed sufficient, an appeal in this cause is granted to the Supreme Court of the State of Missouri."

And afterward, within the time so allowed by the Court for the defendant to file herein its Bill of Exceptions, to-wit; on the 17th day of September, 1919, being the 3rd day of the regular September, 1919 Term of said court, the Court by an order of record in term time, extended the time for filing Bill of Exceptions herein as follows, (Caption Omitted):

"For good cause shown it is ordered by the Court that the time for filing Bill of Exceptions in this cause be and the same is hereby extended until on or before the third day of the next regular term of this Court."

And now here, on this 10th day of June, 1920, and within the time so allowed and extended by the Court for filing Bill of Exceptions, herein, the defendant presents this, its Bill of Exceptions, and prays the Court that the same may be signed, sealed and made a part of the record herein, which is accordingly done.

32 Witness my hand as Judge of said Division of said Court, this the day and year last above written.

GRANT EMERSON,
Judge of Division Number Two,
Jasper County Circuit Court.

The foregoing is a fair abstract of the record and presents all of the record pertaining in any way to the questions raised by appellant on this appeal.

CYRUS CRANE,
ROY BOND,
Attorneys for Appellant.

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34 And thereafter, and on the 12th day of January, 1921, the following proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1920.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Come now the said parties, by attorneys, and after argument herein, submit this cause to the Court.

And thereafter, and on the 6th day of June, 1921, the following further proceedings were had and entered of record in said cause, to-wit:

35 In the Supreme Court of Missouri, Division No. 1, April Term, 1921.

21819.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Appeal from the Circuit Court of Jasper County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised

of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jasper County rendered, be in all things affirmed and stand in full force and effect; and that the said respondent recover against the said appellant her costs and charges herein expended and have therefor execution. (Opinion filed.)

And on the same day, to-wit, the 6th day of June, 1921, there was filed the opinion of the Supreme Court of Missouri in said cause, which said opinion is in the words and figures following, to-wit:

36 In the Supreme Court of Missouri, Division No. One, April Term, 1921.

No. 21819.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Action for personal injury. Plaintiff was a member of the family of her son, John Goodrich, who resided at Pittsburg, Kansas. The latter was an employe of the defendant, and on August 4, 1917, he obtained from his employer for his mother a free pass over defendant's railroad from Pittsburgh to Howe, Oklahoma. On August 9, 1917 while riding on this pass, on one of defendant's passenger trains, enroute from Pittsburg, Kansas, to Howe, Oklahoma, and while passing through Newton County, Missouri, plaintiff was seriously injured through the negligent management and handling of the train by defendant's employes. On the back of the pass this condition was printed: "This pass is not transferable, must be signed in ink by the holder thereof, and the person accepting and using it thereby assumes all risk of accident and damage to person and baggage."

The case was tried without a jury. The defendant asked the court to declare as a matter of law that the stipulation on the back of the pass was valid and binding and that by reason thereof plaintiff was not entitled to recover. This declaration was refused; the court found for the plaintiff and assessed her damages at $8,000,
37 the sum that had been stipulated in advance to be so assessed, in the event the finding was for the plaintiff. From the judgment rendered in accordance with the finding and assessment of damages defendant appeals.

It seems to be conceded by appellant that under the law of this State, as declared by its courts, a person travelling on a free pass granted him by the carrier is a passenger and not a trespasser or mere licensee; that such person is entitled to the same degree of care as any other passenger, and may hold the carrier liable for injuries resulting from its negligence or that of its servants; and that a condition annexed to his pass attempting to relieve the carrier of the consequences of its negligence is ineffective because against

public policy. (Bryan v. Railway, 32 Mo. App. 228; Huckstep v. Railway, 166 Mo. App. 330; Young v. Railway, 93 Mo. App. 267; Lemon v. Chanslor, 68 Mo. 340; Shearman v. Railroad, 72 Mo. 62; Padgitt v. Moll, 159 Mo. 143; Powell v. Railroad, 255 Mo. 420.)

Appellant contends, however, that, as plaintiff was traveling from one State to another on an interstate free pass, issued, as it alleges, in accordance with the provisions of the Hepburn Act (U. S. Comp. Stats. 1916 p. 9069, sub-div. 5 of sec. 8653), the rule of decision, with respect to the validity of stipulations in such passes exonerating the carrier from liability for negligence, followed by the United States Courts, and not that followed by the courts of this State, should be applied in deermining the question of defendant's liability.

In the trial of causes governed solely by common law in the United States courts, those courts follow their own understanding of the common law regardless of the decisions of the courts of the State in which the cause of action arose. (Bevtler v. Railroad, 224 U. S. 85; Fowler v. Railroad, 229 Fed. 374.) And the former courts have always held that under the common law, irrespective of any act of Congress regulating interstate commerce, stipulations in a free pass exempting a carrier from liability for negligence are
38 valid and enforceable. (Northern Pacific Railroad Co. v. Adams, 192 U. S. 440; Boering v. Railroad, 193 U. S. 442; Wiley v. Railroad, 227 Fed. 129.) The instant case, however, having been instituted in a state court of this State, on a cause of action which accrued in this State, and having been tried in such state court, is to be determined in accordance with our applicable local state law, unless that law has been superseded by some act of Congress in the regulation of interstate commerce. (Adams Express Co. v. Croninger, 226 U. S. 491.)

"Railroad corporations, like all other corporations and persons, doing business within the territorial jurisdiction of a State, are subject to its law. It is in the law of the State, that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons travelling on interstate trains are as much entitled, while within a State, to the protection of that State, as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of nonfeasance or of misfeasance committed within its
39 limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law." (Chicago, Milwaukee, &c. Railway v. Solan, 169 U. S. 133, 137, 138.)

It is claimed by appellant that all state laws on the subject of interstate free passes, including those relating to personal injuries negli-

gently inflicted by the carrier upon persons while being carried on such passes, were superseded, or annulled, by the Act of Congress of June 29, 1906, known as the Hepburn Act. That act provides:

"No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their
40 families, * * *. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty."

Whether the provisions just quoted of the Hepburn Act have the effect contended for must be determined in accordance with the rule announced from time to time by the Supreme Court, in slightly varying phraseology, to this effect:

"When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of
Congress fairly interpreted is in actual conflict with the law of
41 the State." (Savage v. Holmes, 225 U. S. 501, 533.)

The rule has been more tersely stated in this language: "To have the effect of superseding a state law it is not sufficient that a congressional regulation of commerce invades the same field; it must expressly cover the precise subject-matter or show a purpose to take legislative possession of the whole field." (12 C. J. 18.)

The plain and obvious import of that part of the Hepburn Act under consideration is to prohibit the issuance by an interstate carrier of interstate free passes to any persons, except those of certain designated classes, and to subject both the carrier issuing such a pass and the person using it, in violation of its prohibition, to certain penalties. With respect to the issuance of passes to persons coming within the exception, nothing is said; there is no reference whatever to the form or provisions of any such pass, or to the undertaking thereby assumed by the carrier issuing it; or to the liability, if any, that may be incurred in the transportation thereunder, for a failure on the part of the carrier to exercise care, or otherwise. As evidenced by the language, the sole purpose of the enactment of these

provisions was to prohibit the issuance of free transportation by interstate carriers. However, the issuance to certain classes of persons was excepted from the operation of the Act. So far as the cases coming within the exception were concerned the law remained unchanged. After the passage of the Act, as to the persons named in the exception, the carrier could issue free interstate passes, on such conditions, and under such stiplations, as it saw fit; or it could refuse to issue them at all, just as it could, and did do, prior thereto. The only regulation of interstate free passes undertaken by the Act was to prohibit their issuance and use—except with respect to the persons specifically excluded from its operation.

It is obvious, that if Congress, by the Hepburn Act, has
42 assumed the regulation of the duties (and the liability arising from their breach) pertaining to the transportation of persons under interstate free passes, in cases which are in terms excluded from the operation of the anti-pass provision of the Act, it must be because the Act as a whole, in its general scope and purpose, indicates that Congress has chosen to occupy the entire field of liability incident to the carriage of interstate passengers. What duty, if any, a carrier owes a gratuitous passenger is but a phase of the larger question of what duty it owes to passengers generally.

The objects sought to be attained by the original Interstate Commerce Act of 1887 (24 U. S. Statutes at Large, 279 c. 104) was to secure continuous carriage, and just and uniform rates, and to compel the furnishing of equal facilities. It contained no provision touching liability for negligence on the part of the carrier in carrying either persons or property. (Pennsylvania Railroad Co. v. Hughes, 191, U. S. 477, 487, 488.) The first legislation by Congress with respect to such liability was the Carmack Amendment to the Hepburn Act (34 U. S. Stats. at Large, 584, 585, c. 3591) and that dealt with the carriage of property only. (Adams Exp. Co. v. Croninger, supra.) The Act will be searched in vain for a correlative provision relating to the carriage of persons. The anti-pass provision of the Act was merely in furtherance of the purpose of the original Interstate Commerce Act to secure equality and prevent unjust discrimination.

Whether responsibility for personal injuries sustained by interstate passengers is still subject to the regulations of the several States does not seem to have ever been directly passed upon by the Supreme Court, but in Southern Pacific Co. v. Schuyler (227 U. S. 601, 612) it held that the anti-pass provision of the Hepburn Act does not deprive a party who accepts gratuitous carriage in interstate commerce, in actual but unintentional violation of the prohibition of *of*
43 the Act, of the benefit and protection of the law of the State imposing upon the carrier a duty to care for his safety.

The Supreme Court of Indiana, in passing upon the precise question under consideration here, held that the Hepburn Act and the Carmack Amendment thereto do not attempt to regulate liabilities of carriers of persons on valid free passes, and that such liabilities continue subject to state statutes. (Clark v. Railway, 119 N. E. 539.)

Our own conclusion is that Congress has not legislated on the sub-

ject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States.

In accordance with the views herein expressed, the judgment nisi should be affirmed. It is so ordered.

WILLIAM T. RAGLAND,
Commissioner.

Brown, C., absent.
Small, C., concurs.

Per Curiam:

The foregoing opinion of Ragland, C., is adopted as the opinion of the Court.
All the judges concur.

44 And thereafter, and on the 14th day of June, 1921, the said appellant filed in said cause its motion for rehearing and suggestions in support of motion for rehearing, which said motion and suggestions are in the words and figures following, to-wit:

In the Supreme Court of Missouri.

No. 21819.

ELIZABETH VAN ZANT, Respondent,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Motion for Rehearing.

Comes now the Kansas City Southern Railway Company, appellant herein and moves the Court to grant a rehearing and re-argument in the above entitled cause for the following reasons, to-wit:

1. Because the opinion and judgment of this Court are in conflict with a controlling decision to which the attention of the Court was not called through inadvertence of counsel, said decision being N. Y. Central R. R. Co. vs. Mohney, 252 U. S. 152.

2. Because this Court has overlooked decisions and questions decisive of the case and duly submitted by counsel for appellant, which decisions and questions, if considered and followed by the Court, would necessarily result in a reversal of this case.

(*a*) This Court has overlooked and not referred to or in any way commented on the case of Charleston, etc. Ry. Co. vs. Thompson, 234 U. S. 576, which is directly in point and is controlling on the

case at bar. The same was duly called to the court's attention in appellant's brief, page 20, and the opinion in said case set out in full.

(*b*) This Court has overlooked and in no way referred to the Telegraph cases (so called) which are controlling and conclusive on the case at bar, in that they announce a precisely similar rule, to that for which appellant is contending, to-wit, that inasmuch as Tele-
45 graph companies are under the operation of the Interstate Commerce law liability for failure to properly transmit messages is governed and controlled by Federal and not by State law, although the question of such liability has not been directly legislated upon by Congress in the Interstate Commerce Act or the amendments thereto. Cases so holding are:

Leftridge vs. Union Tel. Co. 277 Mo. 90 l. c. 97-98.
Tel. Co. vs. Lbr. Co. 251 U. S. 27.
Tel. Co. vs. Boegli, 251 U. S. 315 l. c. 317.

These cases were called to this Court's attention in appellant's Points and Authorities II, page 6, and were commented on and quoted from in appellant's brief, pages 12 to 17.

(*c*) This Court has entirely overlooked the question duly raised by appellant, that exactly similar, analogous, and controlling is the opinion of the United States Supreme Court in Prior vs. Williams, 41 Supreme Court Reporter, No. 4, page 36, wherein the United States Supreme Court held that under the Federal Employers' Liability Act, defense of Assumption of Risk was to be measured by Federal and not by State decisions, and in making this holding overruled the Supreme Court of Missouri on the proposition, and announced the applicability of Federal law notwithstanding the Employers' Liability Act does not specifically undertake to legislate on the precise question.

Wherefore, it is respectfully submitted that Motion for Rehearing herein should be granted.

CYRUS CRANE,
RAY BOND,
Attorneys for Appellant.

46 In the Supreme Court of Missouri.

No. 21819.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Suggestions in Support of Motion for Rehearing.

I.

This Court in its opinion affirms the judgment in plaintiff's favor in the lower court on the ground that the Interstate Commerce Act,

permitting the issuance of free interstate passes, does not contain legislation with reference to the carrier's liability in connection therewith, and therefore state regulations may still continue. The exact language of this Court on the proposition is as follows:

"Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States."

Permit us to say with all deference to and respect for the Court that in arriving at this conclusion, this Court has seemingly, at least so far as anything appears in the opinion, entirely ignored the most potent decisions and arguments which would point to a contrary conclusion.

II.

Before proceeding further to call attention to the decisions and questions which this Court has overlooked or omitted in arriv-
47 ing at its conclusion, we wish to call attention to a case which counsel for appellant omitted to cite or call to this court's notice in any of the briefs. A case which in our judgment plainly shows that the Supreme Court of the United States has directly held (in addition to other cases which will be hereafter referred to holding the same thing) that the case as to liability of the railroad company to a passenger making an interstate trip on a free pass, is governed by Federal and not State regulations, to wit, N. Y. Central R. R. Co. vs. Mohney, 252 U. S. 152. Of that case the following is a correct summary:

1. Mohney, a railroad employee riding on an annual pass, was injured in the State of Ohio, where the law is the same as it is in Missouri with reference to the stipulations on the pass, releasing the carrier from liability for negligence—that such stipulations are void.

2. It was found as a matter of fact that Mohney could recover, notwithstanding the stipulations on the pass, for two reasons:

(*a*) Because it was found that he was making an intrastate and not an interstate trip, and therefore the validity of the release depended on the laws of Ohio and were void.

(*b*) Because the defendant railroad company was guilty of willful and wanton negligence, and therefore, of course, the stipulations on the pass were of no effect.

3. The opinion of the Supreme Court points out with extreme care that because the trip was intrastate and not interstate, the provisions of the state law were applicable. The plain inference is, and a reading of the case it seems to us will convince anyone, that all the Court were agreed that if the trip which the plaintiff was making had been

interstate, then the stipulations on the pass would govern, and after showing that the Court was of that opinion, the language of Mr. Justice Day and Mr. Justice Van De Vanter, leaves no room for doubt. They said:

"(We) concur in the result, being of the opinion that Mohney was using the annual pass in an interstate journey, and that
48 to such a use of the pass the Ohio law was inapplicable, but that the releasing clause on the pass would not cover or embrace his injury, because the latter resulted from willful or wanton negligence, as to which such a clause is of no force or effect."

Now we firmly believe that if this Court will carefully read and consider the Mohney case, and in connection with it, Charleston, etc., Ry. Co. vs. Thompson, 234 U. S. 576, it cannot escape the conclusion that the Supreme Court of the United States has already held unmistakably, that a passenger making an interstate trip on a free pass cannot recover for the ordinary negligence of his carrier, when the stipulations on the pass preclude such recovery. (Of course, in the case at bar there is no question of willful and wanton negligence, as we have heretofore pointed out. It was neither pleaded nor proven.)

It therefore follows that this Court is in error in saying as it does in its opinion as follows:

"Whether responsibility for personal injuries sustained by interstate passengers is still subject to the regulations of the several States does not seem to have ever been directly passed upon by the Supreme Court."

Because from the two cases above mentioned, it is perfectly obvious that the question of responsibility of the railroad companies for personal injuries sustained by interstate passengers traveling on free or gratuitous passes, exempting the carrier from liability, has been directly passed upon by the United States Supreme Court, and it held that there can be no recovery under such circumstances.

Take another aspect of the Mohney case. It will be seen from a reading of the opinion that the main proposition discussed and analyzed by the United States Supreme Court was whether or not, under the facts, Mohney was making an intra or an interstate trip. This, of course, was for the purpose of determining whether or not the laws of Ohio were applicable. If, as plaintiff in this case contends, and as this Court has announced in its opinion, state regulation remained whether the trip was inter or intrastate, then
49 the United States Supreme Court was doing a foolish and unnecessary thing in attempting to analyze and determine what the character of the trip was, whether inter or intrastate. If state regulation still remained, the result would have been the same in either event—the law of Ohio would have applied and the stipulations held to be invalid.

Does not this show, beyond any possibility of question, that the entire court were holding that on an interstate trip, Federal law applied, and on an intrastate trip, state law applied? Can any reasoning mind reach any other conclusion? It seems to us impossible.

III.

Railway Company vs. Thompson, 234 U. S. 576.

We are unable to undertstand how this Court, ordinarily so careful in the consideration of all the legitimate questions raised on appeal, could have overlooked, not mentioned, nor in any way referred to the above case—especially in view of the fact that it decides the precise question involved in the case at bar. It was duly called to this Court's attention in the Points and Authorities in appellant's brief, and it was quoted in its entirety in the brief on pages 20, 21 and 22. In the Thompson case the facts are exactly the same as in this case. The plaintiff, Lizzie Thompson, a member of the family of an employee, was traveling on an interstate pass, making an interstate trip. She was injured by the negligence of the defendant railroad company. It was held that because of the stipulations exempting the carrier from liability on the back of the pass, that she could not recover.

We most respectfully insist that a case on all fours decided by the Supreme Court of the United States should not be ignored by this Court, where the whole question to be determined is essentially one of Federal law.

50 Let us look further at the Thompson case. The "main question" as stated by the Supreme Court of the United States itself in that case was whether or not the pass was a free or gratuitous pass. The contention of the injured plaintiff was that it was not a free pass because it was issued really as part payment for the services of an employee. This contention was rejected by the Supreme Court and it was held to be exactly what it was called—a free pass.

Just as in the case at bar, so in the Thompson case, the pass was issued under the provisions of the Interstate Commerce Act.

Now the Supreme Court of the United States, after finding the pass was free, then held that there was no question as to the validity of the stipulations exempting the railroad company from liability, using this language:

"As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this Court. Northern Pacific Ry. Co. vs. Adams, 192 U. S. 440; Boering v. Chesapeake Beach Ry. Co., 193 U. S. 442. Judgment reversed."

The only answer which respondent has ever made to the Thompson case, which is exactly in point here and decisive of the case, is that the injury in the Thompson case occurred in the State of Georgia, where, as they claim, the limitations on liability under these circumstances are different from Missouri, not held to be invalid.

But we respectfully and earnestly insist that this distinction is one resting wholly in the imagination of counsel. The United States Supreme Court did not rest its opinion on any such proposition, and made no reference whatever to the state law in holding that the stipu-

lations were valid. It announced in the simplest and baldest terms that if the pass was once found to be a free pass, then there could be no question of the validity of the stipulations against liability. It is therefore absolutely unwarranted in attempting to distinguish the Thompson case from the case at bar.

51 Without going into an analysis of the multitude of cases wherein analagous propositions have arisen under many and different circumstances, this Court must certainly be aware of the fact that the interpretation of the Interstate Commerce Act by the United States Supreme Court has always and invariably been to give the Act and all of its provisions a uniform operation over the entire United States. That is to say, in questions of liability arising on contracts made under the Interstate Commerce Act, it has been held that there could not be and must not be one rule of liability in one jurisdiction and another and different one in another jurisdiction, but that the Act and all matters coming under it must be uniformly applied, and the same result reached everywhere. We know of no exception to this interpretation of the Act. Now, if this Court is correct in the present opinion, then it would follow that to a passenger making an interstate trip on a free pass, exempting the railroad company from liability, recovery would depend wholly upon the question of where the accident happened. If it happened in one State, then there might be liability and in another State not. There is no sanction for making such a claim or reaching such a result, if we adhere to and follow the unbroken rule of the Supreme Court has heretofore established by its decisions—that is, uniformity.

IV.

May we inquire in the friendliest spirit why this Court does or why it should cling so tenaciously to state regulation of interstate matters, when it has been so completely demonstrated by past experience and especially by the uniform attitude of the United States Supreme Court that this position is untenable.

These two prominent illustrations (both of which were called to the attention of the Court in our original brief and which have been entirely ignored by this Court, probably due to our inability to present them with sufficient clarity or force), to-wit:

52 1. The Telegraph Cases.

This Court in Leftridge vs. W. U. Tel. Co. 277 Mo. 90 had pressed upon its attention this same proposition in another form. In that case it was claimed that there was no regulation, that is no legislation, governing the liability of the Telegraph Companies' failure to deliver messages, and therefore the matter was left to the control of the States. This Court indicated very clearly that it would have been inclined to take that view of the matter, and said in its opinion:

"There is plausibility in the argument, for it is not to be presumed that Congress would withdraw from the State the right to

protect persons and property within its limits, otherwise than by the expression of a clear intent to that effect."

But this Court was mindful of its duty to follow, on a question of this character, the decisions of the Supreme Court of the United States, and therefore was obliged to say, although apparently reluctantly, as follows:

"This argument in its application to the case has been met by the Supreme Court of the United States in the case of W. U. Tel. Co. vs. Brown 234 U. S. 542."

Therefore, this Court was forced to and did hold that state regulation no longer had any place in the liability of Telegraph Companies for failure to transmit messages, and State Statutes could not be made applicable.

At this point permit us to again urge on this Court the force of all these Telegraph Cases, which were argued at length in our brief on pages 12, 13, 14, 15, 16 and 17, but which for some reason have been entirely ignored by this Court in arriving at its conclusion. We cannot but believe that by direct analogy they are clearly in point on the question at issue. When the sender of a telegraph message sues for its non-delivery, he is suing on a contract. There is no where in the Acts of Congress any legislation as to the liability under the contract on which he is suing. There is no attempt
53 to determine what penalties shall be imposed for failure to transmit a message, but nevertheless the United States Supreme Court holds that the entire matter is under the operation of Federal and not State law, and this Court has recognized and bowed to that holding. So in the case at bar, the defense of the railroad company is based on the contract which it issued, to-wit, a pass with certain stipulations thereon. In other words, it is using the contract as a defense and not the basis of a cause of action, but the same principle applies, to-wit, that the contract in issue is governed by the same principle, that is that it is to be controlled and interpreted by Federal not State law. Therefore, it seems to us that the analogy is complete and that the Telegraph Cases would be controlling in the result that must be arrived at in this case, even though there had been no holding of United States Supreme Court in regard to passes.

2. Assumption of Risk under Federal Employers' Liability Act.

An examination of that Act will show that the only reference in it to the defense of Assumption of Risk is that such defense is not open to the defendant when the action is based on the violation of safety appliance acts, etc. Aside from this, there is no legislation with regard to defense of Assumption of Risk at all. This Court again on that question took the position that where the defendant pleaded Assumption of Risk, that defense and position of law was to be interpreted by the decisions of the state in which the cause of action arose, and plainly declared its determination to stand on

the right of the state court to apply the doctrine in the light of its own decisions in Holloway vs. Ry. 276 Mo. 490; Fish vs. R. R. 263 Mo. 106; Williams vs. Prior 200 S. W. 53. But when the last named case reached the Supreme Court of the United States, it held that the doctrine of Assumption of Risk was to be interpreted and applied by Federal and not State decisions.

54 It seems to us that the Supreme Court of the United States has made itself perfectly clear on this whole matter in the very concise statement found in Tel. Co. vs. Lbr. Co. 251 U. S. 27 where the reason for applying Federal rules in the Telegraph Cases was rested "upon the necessary effect of the general provisions of the Act, bringing Telegraph Companies under the control of the Interstate Commerce Act. The condition as to continuance of state power here made is to be adversely foreclosed."

With these illustrations before it, we cannot understand why this Court should longer cling to the doctrine of the applicability of state regulation. The final guide in all these matters must be the decisions of the United States Supreme Court. Are not the foregoing illustrations (which have not been referred to in this Court's present opinion) sufficient to clearly demonstrate that this Court is occupying an untenable position? It seems to us, therefore, that a rehearing should be granted and full consideration given by this Court to those decisions of the United States Supreme Court which we firmly believe must lead to a conclusion opposite of what has been reached by this Court. In all fairness we think that this Court ought not let stand an opinion which fails to touch differentiate, comment on or quote from decisions of the Court by which it must be finally guided, when those decisions are directly in point, touch the precise question at issue, and are plain in their enunciations. It has always been a matter of satisfaction to the bar of this State to know that when they have seriously and earnestly presented a question to this Court and buttressed it by decisions which they believe to be in point and controlling, they will know when the case is ended just where this Court stands, and its reasons for the position taken. In the present case we cannot feel that way about the opinion rendered, because it totally omits mention of the most applicable decisions rendered by the Supreme Court of the United States on the question.

Wherefore, it is prayed that a rehearing be granted.

Respectfully submitted,

CYRUS CRANE,
RAY BOND,
Attys. for Appellant.

55 And thereafter, and on the 24th day of June, 1921, the respondent's Suggestions in Opposition to Appellant's motion for Rehearing was filed in said cause, which said suggestions are in the words and figures following:

In the Supreme Court of Missouri.

No. 21819.

ELIZABETH VAN ZANT, Respondent,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Respondent's Suggestions in Opposition to Appellant's Motion for Rehearing.

The grounds set out in the motion for rehearing and in the suggestions in support thereof all relate to questions and authorities that have been presented fully by appellant to this court, both in brief and in oral argument, with the one exception of the citation of the case in the first paragraph of the motion for rehearing, which is discussed in the second paragraph of appellant's suggestions in support of this motion, viz.:

New York Central Ry. Co. v. Mohney, 252 U. S. 152.

The points decided, or the points in judgment in that case, have no similarity to the present case, and whatever may have been said by the two judges in the minority opinion in that case is admittedly obiter, as no such question was before the court, and the court, in the majority opinion, l. c. 158, removes entirely from the decision in the case before this court the question as to what would have been the decision of the court had it been an interstate pass.

The expression of the majority opinion is as follows:

"The evidence in the record as to the terms and conditions upon which the pass was issued to the plaintiff is so meager that, since it is not necessary to a decision of the case, we need not and do not consider the extent to which the case of Charleston R. R. Co. v. Thompson, 234 U. S. 576, is applicable to an employee using a pass furnished to him seemingly s a necessary incident to his employment."

The vital question before this court, decided in the opinion in the Van Zant case, to-wit:

Has Congress, by the Hepburn Act, regulated the validity or invalidity of the release on the back of the free pass in this case to the explusion of the laws of this state?

was not considered in the case of Railway Company vs. Mohney, 252 U. S. 152. Neither was the other vital question in this case, that in a proper state of facts relating to an interstate pass, where the passenger was injured through the negligence of the carrier while traveling on said pass and said action was brought and tried in a

Federal court nisi, the United States courts apply their own rules as to whether a contract for a release on the back of the pass was a defense to such action and not void as against public policy; while in an action tried in the state courts, the state courts apply their own rules as to the validity or invalidity of such release, which will not be interfered with by the United States court when taken from the state court on writ of error to that court.

Examining carefully the Mohney case, which had already been published in the advance sheets of the Supreme Court Decisions when this case was first briefed, and in the printed volume when the case was argued in this court, it will be seen that no question relating to interstate commerce or an interstate pass was in the record of that case. The case went to the Supreme Court of the United States on writ of error from the state Court of Appeals of the state of Ohio.

252 U. S., l. c. 154-155.

The Court of Appeals held that Mohney was an intrastate passenger when injured, and by a divided court affirmed the judgment on two grounds, to-wit: (1) that the pass was issued to Mohney as part consideration of his employment, and, (2) on the ground (all judges concurring) that the court was clearly of the opinion that the
57 negligence in this case, under the evidence, was willful and wanton. That part of the opinion of the state Court of Appeals of Ohio, upon which the case was sent to the Supreme Court of the United States, namely, that the pass was not a free pass, was in direct conflict with the opinion of the United States Supreme Court in the Thompson case. The opinion of the Supreme Court in the Mohney case disposed of these several supposed grounds of conflict and removed them from the record in this case entirely by deciding that the pass issued to Mohney was not an interstate pass, but an intrastate pass.

This first holding entirely removed and made it unnecessary to discuss any other question, even according to the theory of appellant in this case, because it is admitted by respondent in the Van Zant case, now before this court, that the pass was a free pass. It therefore follows that the opinion of the court in the Mohney case could not, under any consideration, be held an authority in the Van Zant case.

The Supreme Court in the Mohney case, 252 U. S., l. c. 156-157, discusses the character of the pass in the following words:

"But that contract, in terms, was good only between Airline Junction and Collingwood over a line of track wholly within Ohio."

By what process of reasoning appellant's attorneys can build an argument in support of their theory in the case here before this court from a decision based on an admitted intrastate pass is not apparent.

The court, in the Mohney case, further decided that the decision of the state court could be upheld on the ground that the negligence complained of was gross negligence. The Supreme Court had no authority nor power to decide, on the record as it appeared before the

court in that case, the issues in a case such as is presented in the case now before this court, and any expression of opinion outside of this record is mere obiter.

58 In the Van Zant case it is admitted that the pass was a free pass. The case was tried in the state court in accordance with the decisions as to public policy and the rules of negligence of the state of Missouri. The principal point of discussion, both in brief and orally before the court, was as to whether Congress has regulated the invalidity of the release on the back of the pass to the exclusion of the law of the state where the injury occurred. As above stated, this identical question was not presented to the Supreme Court of the United States in either the case of Railroad Company v. Thompson or the Mohney case. It could not possibly have been decided, because the facts were not present upon which to base such a question.

In this connection we ask the court to note the following decisions as to the binding effect of decisions of the Supreme Court relating to questions before the court which were not urged in a former case. In the case of New v. Oklahoma, 195 U. S., l. c. 256, the Supreme Court of the United States held that the Federal Supreme Court will not consider decisions on the question of its jurisdiction in a prior case in which jurisdiction was entertained without any suggestion as to the want of it.

The pass in the Ohio case being an intrastate pass and not an interstate pass, the decision of the court in that case must be considered as to the point in judgment as applying only to cases involving questions as to intrastate passes, and anything said by the court in a case of this character relating to an interstate pass would be obiter dicta, and comes under the rule announced by the Supreme Court of the United States in the case of McCormick Harvesting Machine Co. v. Aultman, 169 U. S., l. c. 611, in which the court held that the expression of opinion on a point not decided by the court is a mere dictum lacking the force of a judicial decision. Also the case of Bardes v. Bank, 178 U. S., l. c. 534, in which the court held that an opinion given in a decision can not be relied upon as bind-

59 ing authority unless the case called for its expression.

Appellant's attorneys, in their suggestions in support of their motion, entirely overlooking this rule, have this remarkable suggestion to offer, namely:

"Because from the two cases above mentioned (referring to the Mohney case and the Thompson case) it is perfectly obvious that the question of responsibility of the railroad companies for personal injuries sustained by interstate passengers traveling on free or gratuitous passes, exempting the carrier from liability, has been directly passed upon by the United States Supreme Court, and it held that there can be no recovery under such circumstances."

A more absurd statement could not have been made. If it means anything, it is that you can take two decisions of the Supreme Court of the United States, based on entirely different statements of facts, and select from such decisions such facts as fit your theory and also

such expressions of the court as fit your theory, and make them an authority for facts in another case in which the facts are entirely different from the facts in either of the cases considered by the court. To illustrate: in the decision in the Thompson case, 234 U. S. 578, the only point of difference between the Court of Appeals of Georgia and the holding in the United States Supreme Court was as to whether the pass was a free pass. In the Georgia case the pass was an admittedly interstate pass. In the Ohio case the pass was both a free pass and an intrastate pass. In the Ohio case the question of gross negligence was a controlling feature of the case. In the Georgia case—Railroad Company vs. Thompson—gross negligence was not an issue. So we find the appellant undertaking, as he says, to piece these two cases together, and from intimations in the cases by different judges he can pick out enough to show from these words and intimations that if the court had had the instant case before it, it would have decided the same as contended for by appellant.

60 Appellant has not shown to this court any case, either state or Federal, where the question on the state of facts as shown in the Van Zant case has been decided as contended for by appellant in its brief. Neither has it shown any decisions of any Federal court holding that Congress, in the passage of the Hepburn Act, has taken over from the state the whole or any part of the field of liability for injuries to passengers riding on a free pass. This question has never been presented to the Supreme Court of the United States on a state of facts as in the instant case, and the Hepburn Act, in that respect, has never been discussed by that court.

We have heretofore pointed out in our original brief the fact that the decisions of the Federal court as to liability in cases such as the present one, and as to what law shall control, are governed by the local law of the forum in which the case is tried nisi.

At the risk of being tedious, we again point out that where the case is tried nisi in a state forum and goes by way of writ of error to the Federal court, the Federal court applies the state law as to liability, while on the other hand, where the trial nisi is in the Federal court, that court applies its own interpretation of the common law.

Appellant urges that the question of liability here is dependent upon the provisions of the Hepburn Act, which it quotes. It is significant that the Act contains not one single provision, either as to the question of liability for negligent injury to a passenger riding on a free pass, or as to the validity of a release on the back of the pass. It simply provides, as pointed out by the opinion in this case, what shall constitute a free pass, to whom the same may be issued, and the penalty for issuing a pass to a person not entitled thereto.

61 That the Hepburn Act has nothing to do with the question of liability for negligent injury to a passenger riding on a free pass is clearly demonstrated by the decisions of the United States Supreme Court relied upon by appellant. The case of

Northern Pacific Ry. Co. v. Adams, 192 U. S. 440,

cited by appellant, was a case tried nisi in the Federal court, and, as stated above, under such circumstances the Federal court applies its own interpretation of the common law as to the liability for injuries to a person riding on a free pass where there is a stipulation exempting the carrier from liability for its negligence. The facts upon which this case was decided were of date November 13, 1898. The case went to the Supreme Court of the United States and the decision was handed down some two years or more before the Hepburn Act was passed in 1906, and therefore was not and could not have been based upon the provisions of that Act, and this decision, also, was on the defense interposed by the railroad company. The same is true of the case of

Boering v. Chespeake Beach Ry. Co., 193 U. S. 442,

which was decided two years before the Hepburn Act was passed. It is clear that the Hepburn Act could have no influence on the two foregoing decisions, for the reason that it was not placed on the statute books until some two years after the rule upon which appellant in this case depends for its defense was announced as the settled policy of the United States Supreme Court. The same is true of the case of

Baltimore & Ohio Southwestern Ry. Co. vs. Voight, 176 U. S. 498.

which was decided in 1900, or six years before the adoption of the Hepburn Act. This last case was tried nisi in the Federal court for the Southern District of Ohio and reported in 79 Fed. 561.

62 It will be noted that all three of these cases were tried nisi in the Federal court, and the liability was therefore determined by applying the Federal interpretation of the common law as to the validity of a contract limiting the liability of a carrier for a negligent injury to a passenger riding on a free pass.

This same rule has been applied by the Federal courts as a defense in cases arising originally in the Federal courts to the same extent and in the same way since the passage of the Hepburn Act as prior thereto, as witness

Buetler v. Grand Trunk Ry. Co., 224 U. S. 85,

in which the court said:

"So it has been decided in cases tried in the United States court we must follow our own understanding of the common law when no settled rule of property intervenes."

Also to the same effect is

Southern Pac. R. R. Co. v. Schuyler, 227 U. S., l. c. 612.
Wiley v. Grand Trunk Ry. Co., 227 Fed., l. c. 129.

These decisions and the respective dates upon which they were handed down show conclusively that the Federal courts, and especially the Supreme Court of the United States, have never held or intimated that the Hepburn Act, as it relates to free passes, changed the law with respect to the defense of a carrier in an action for negligence where the release on the back of the pass was pleaded as such defense. This certainly ought to dispose of all the suggestions and objections of appellant against the decision of the court in this case, as these objections are based entirely by appellant's attorneys on their construction and contention that the Hepburn Act does change the law. Overlooking these decisions and
63 their history and meaning has caused appellant's attorneys to misread the opinion of the court in the case of

Ry. Co. v. Thompson, 234 U. S. 576,

as witness l. c. 578, where the court says:

"As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals (of the state of Georgia), as we have stated, and is established by the decisions of this court (not by the provisions of the Hepburn Act). Ry. Co. v. Adams, 192 U. S. 440, and Boering v. Chespeake Beach R. R. Co., 193 U. S. 442."

We confidently believe that a careful reading of the history of these decisions in connection with the Hepburn Act will convince even appellant's attorneys that this court correctly announced the law in the last paragraph of the opinion, where it is said:

"Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States."

The remainder of appellant's brief is based, as it says, on the Hepburn Act as a defense. The Hepburn Act says nothing about defenses any more than about actions, and the above decisions, their holdings and the time the decisions were made, demonstrate that the remaining part of appellant's suggestions and argument have nothing to do with the case before this court, and they also dispose of the surprise of appellant's attorneys that the court did not mention the Thompson case in its opinion, as the entire opinion of the court and the reasons given therefor are such as to eliminate the Thompson case from being applicable in any sense to the record in the instant case.

64 Appellant again urges, as it did in its brief and on the hearing of this case, that the cases cited by appellant based on the Federal Employer's Liability Act, and a line of telegraph cases, are controlling in appellant's favor in this case.

These matters have been gone over and proper distinctions made in the original briefs filed in this case and on oral argument, and it has been demonstrated that these lines of cases have no application to the question before the court in this case. Indeed, as to the cases arising under the Federal Employer's Liability Act, the very subject of that act shows that Congress legislated as to the liability and the remedy, and in fact took over the whole subject. In addition to the point made by respondent in the original brief in this case, pointing out the distinction of the telegraph cases, we submit the following further distinctions:

Western Union v. Brown, 234 U. S. 542:

Suit for mental anguish for failure to deliver message in District of Columbia, the law giving the right being of South Carolina.

Held: As failure to deliver was in another jurisdiction, the tort was committed there, and the Carolina law imposing damages would be extra-territorial.

Also attempts to regulate the conduct of the telegraph company throughout the entire distance, and therefore interferes with interstate commerce, over which Congress has taken exclusive control.

Here the tort was in Missouri and it was Missouri law applied.

Leftridge v. Western Union, 227 Mo. l. c. 94:

Suit (tort) for failure to transmit and use due diligence to deliver in another state a message.

Opinion: "It would be difficult to imagine a cleaner illustration not only of the interstate character of the transaction, but also the interstate character of the control assumed by this state, in which the only act necessarily performed is the harmless one of receiving the message and payment for its transmission."

65 In other words, the tort was committed in another state, and the Missouri law would be extra-territorial.

In the present case the tort was committed in Missouri, and the Missouri law applies only to the relationship between the carrier and the passenger within the borders of the state.

Further quoting, l. c. 94:

"The act or failure to act which incurs the penalty is to be performed in another State."

The distinction is pointed out by this court.

Donovan case:

Congress has legislated on the liability and the remedy, has specified that rates may be classified, has compelled the issuing of a bill of lading and has expressly provided against side contractor.

There are many things in appellant's suggestions and arguments on this motion for rehearing which attorneys for respondent are

forced to confess that they do not understand and are unable to determine, after careful consideration, their purpose as applied to the issue raised by this motion. Such remarks as the following on page 1 of appellant's suggestions:

"* * * this Court has seemingly, at least so far as anything appears in the opinion, entirely ignored the most potent decisions and arguments which would point to a contrary conclusion."

Also the following in the last paragraph under point II:

"Can any reasoning mind reach any other conclusion? It seems to us impossible."

Again, the beginning of the first paragraph under point III of appellant's suggestions:

66 "We are unable to understand how this Court * * * could have overlooked, not mentioned, nor in any way referred to the above case—especially in view of the fact that it decides the precise question involved in the case at bar."

Further, under this same point:

"We most respectfully insist that a case on all fours decided by the Supreme Court of the United States should not be ignored by this Court, where the whole question to be determined is essentially one of Federal law."

And further, under the same point:

"But we respectfully and earnestly insist that this distinction is one resting wholly in the imagination of counsel."

Under point IV:

"May we inquire in the friendliest spirit why this Court does or why it should cling so tenaciously to state regulation of interstate matters, when it has been so completely demonstrated by past experience and especially by the uniform attitude of the United States Supreme Court that this position is untenable." (A lecture.)

On the last page of the suggestions:

"In all fairness we think that this Court ought not let stand an opinion which fails to touch, differentiate, comment on or quote from decisions of the Court by which it must be finally guided, when those decisions are directly in point, touch the precise question at issue, and are plain in their enunciations."

and divers other generalizations, preachments and oratorical exclamations.

No reason can be given for appellant's contention that the Hepburn Act in any way affects the validity of the release on the back of the free pass in this case. Doubtless counsel for appellant
67 hope that, on account of the present tendency to concentrate all powers of government,—legislative, executive and judicial,—at Washington, and the further tendency of the Federal courts to be caught up by this centralizing influence, the Supreme Court of the United States might overlook the reasoning and force of the opinion in the instant case.

Counsel for respondent regret to be forced to admit that this centralizing influence has obtained in this country to such an extent that the field of jurisdiction of the Federal courts has broadened until the state courts have, to a large extent, been stripped of their jurisdictional rights to pass upon questions in cases where it is doubtful if Congress ever meant that the Federal government should take over the questions involved.

Notwithstanding this, we do not believe that the Supreme Court of the United States will, in construing a case like this, hold that the Hepburn Act has been extended to a subject of jurisdiction which is neither mentioned nor intimated in the act, and which subject this court, as above indicated, has interpreted the same way both before and after the passage of the Hepburn Act.

And notwithstanding this centralizing influence, we believe it is the plain duty of this court to continue, as it has in the past and as it has in this case, to decide these questions according to the law and the facts as understood by the court, excepting only those cases where the Supreme Court of the United States, in a proper case which is binding upon this Court, has declared otherwise.

If there is to be any judicial amendment to the Hepburn Act, as suggested by appellant's attorneys, it is yet to be made by the
68 Supreme Court of the United States; but if such amendment must be made judicially, then let this judicial legislation be by the Supreme Court of the United States, and not by the Supreme Court of Missouri.

Respectfully submitted,

F. H. LEE,
KENNEY & KENNEY,
NORMAN A. COX,
HUGH DABBS,
Attorneys for Respondent.

69 And thereafter, and on the 11th day of July, 1921, the following further proceedings were had and entered of record in said cause, to wit:

In the Supreme Court of Missouri, Division No. 1, April Term, 1921.

No. 21819.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Now at this day the Court having considered and fully understood the motion heretofore filed by the said appellant for a rehearing herein, doth order that said motion be, and the same is hereby overruled.

STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the cause of Elizabeth (Goodrich) Van Zant, Respondent, vs. The Kansas City Southern Railway Company, Appellant, No. 21819, as fully as the same appear of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said Supreme Court, at my office in the City of Jefferson, State aforesaid, this 20th day of July, 1921.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court,
of the State of Missouri.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Being informed that there is now pending before you a suit in which The Kansas City Southern Railway Company is appellant, and Elizabeth (Goodrich) Van Zant is respondent, No. 21819, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court of Casper County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,418. Supreme Court of the United States, No. 463, October Term, 1921. The Kansas City Southern Railway Company vs. Elizabeth Van Zant. Writ of Certiorari.

In the Supreme Court of the United States.

No. 463.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner,

vs.

ELIZABETH VAN ZANT, Respondent.

Certiorari.

It is hereby stipulated by and between The Kansas City Southern Railway Company, petitioner in the above entitled cause, and Elizabeth Van Zant, respondent therein, that the transcript of record certified by the Honorable J. D. Allen, Clerk of the Supreme Court of the State of Missouri, on file in the office of the Clerk of the Supreme Court of the United States, in the above entitled cause, can be taken as and for a return to the writ of certiorari issued by the Supreme

Court of the United States, and other and further return to said writ is hereby waived.

CYRUS CRANE,
A. F. SMITH,
Attorneys for The Kansas City Southern Railway Company, Petitioner.
C. H. MONTGOMERY,
NORMAN COX,
HUGH DABBS,
Attorneys for Elizabeth Van Zant, Respondent.

STATE OF MISSOURI, *Set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and complete transcript of the stipulation filed in my office on the 22nd day of November, 1921, in the above-entitled cause, as fully as the same appears on file in my office; and I herewith transmit the said transcript of said stipulation to the Honorable Supreme Court of the United States as my return to the within writ of certiorari.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said Supreme Court of the State of Missouri, at my office in the City of Jefferson, State aforesaid, this 22nd day of November, 1921.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

[Endorsed:] 463/28,418. No. 28,418. In the Supreme Court of the United States. The Kansas City Southern Railway Company, Appellant, vs. Elizabeth Van Zant, Respondent. Return to Writ of Certiorari.

[Endorsed:] File No. 28,418. Supreme Court U. S., October Term, 1921. Term No. 463. Kansas City Sou. Ry. Co., App't, vs. Elizabeth Van Zant. Writ of certiorari and return. Filed Nov. 25, 1921.

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,

vs.

ELIZABETH VAN ZANT, *Respondent*.

No. [redacted]

Motion for Writ of Certiorari.

Petition for Writ of Certiorari.

Brief in Support.

Owen Gaffy,

A. P. Bryan,

Attorneys for Petitioner.

P. H. Moore,

Ray Bond,

Of Counsel.

—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,
vs.
ELIZABETH VAN ZANT, *Respondent*.

No.

MOTION FOR WRIT OF CERTIORARI

Now comes petitioner above named by its attorneys and moves this Honorable Court that by certiorari or other proper process, directed to the Honorable Judges of the Supreme Court of Missouri, it require the said Supreme Court aforesaid to certify to this Honorable Court for review and determination, a certain cause lately pending in said Supreme Court of Missouri wherein this petitioner was appellant and Elizabeth Van Zant was respondent, and for that purpose the said petitioner tenders herewith its petition and brief with a certified copy of the entire record of this cause in the said Supreme Court of Missouri, together with certified copy of the Record of Proceedings had, for the purpose of review of the same in the said Supreme Court.

Cyrus Crane
A. J. Smith
Attorneys for Petitioner.

—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,
vs.
ELIZABETH VAN ZANT, *Respondent*.
} No.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully petitions for a review by your Honorable Court of the proceedings of the Supreme Court of Missouri in the case of *Elizabeth Van Zant, respondent, vs. The Kansas City Southern Railway Company, appellant,* wherein that Court rendered a judgment against your petitioner, and which by due process has been made final by reason of the action of said Supreme Court of Missouri in refusing to grant rehearing thereof.

Your petitioner, who was the defendant in the trial court and appellant in said Supreme Court of Missouri, believes that the aforesaid judgment of said Supreme Court of Missouri is erroneous and that this Honorable Court should require that the said case be certified to it for its review and determination in

conformity with the provisions of the Act of Congress in such cases made and provided, for the following reasons, to-wit:

The action was brought by Elizabeth Van Zant, the respondent, a dependent member of the family of an employe of your petitioner, for damages for alleged personal injuries received while traveling upon a free interstate pass, issued to her by your petitioner from Pittsburg, in the state of Kansas, to Howe, in the State of Oklahoma, said pass having thereon and as a part of the same, the following conditions:

> "Good for stop-over at will on application to conductor.
>
> This pass is not transferable, must be signed in ink by the holder thereof, and the person accepting and using it thereby assumes all risk of accident and damage to person and baggage.
>
> Forfeited if presented by other than person named and may be revoked without notice.
>
> The above conditions are hereby agreed to. I also represent and declare that I am not prohibited by Federal and State laws from receiving free transportation and this pass will be lawfully used."

The same were duly signed by respondent. The trial court, being the Circuit Court of Jasper County, Missouri, rendered judgment in favor or respondent against your petitioner in the sum of Eight Thousand ($8,000.00) Dollars and denied the motion of petitioner for a new trial. The Supreme Court of Missouri affirmed said judgment and erred in so doing for the following reasons, to-wit:

1. The testimony showed, without contradiction, that the respondent, Elizabeth Van Zant, was upon an interstate journey; was traveling on a free interstate

pass; that said pass contained the stipulations above set out, and the same were agreed to by respondent.

2. There was no claim in the petition of the plaintiff, Elizabeth Van Zant, nor was there any evidence that the defendant below, The Kansas City Southern Railway Company, was guilty of wanton or willful negligence.

3. On such evidence and showing the judgment in the trial court should have been rendered for this petitioner.

4. The motion of petitioner for new trial should have been granted for the reasons therein set forth.

5. Both the trial court and the Supreme Court of Missouri erred in holding that the conditions on the back of the pass were to be governed and controlled by the State instead of Federal law.

6. Under Federal law, and decisions, and particularly the decisions of this court, the stipulations or conditions on the back of said pass were valid, binding and constituted a complete defense to the action, and the trial court and the Supreme Court of Missouri erred in not so holding.

7. The said judgment is repugnant to and in conflict with the laws of the United States, and especially the Acts of Congress of the United States, approved February 4, 1887, and Acts amendatory thereof, known as Interstate Commerce Laws.

8. Said judgment is repugnant to, and in conflict with, the Constitution of the United States, and especially Article 1, Section 8, Clauses 3 and 18 thereof, to-wit:

> "The Congress shall have power * * * *
> Clause 3. To regulate commerce with foreign

nations, and among the several states, and with the Indian Tribes.

Clause 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or office thereof."

9. Said judgment is repugnant to, and in conflict with Federal legislation and the common law rules as accepted and applied, in Federal tribunals.

10. Said judgment is repugnant to, and in conflict with the Constitution, to-wit:

Amendments, Article V:

" * * * Nor shall any State deprive any person of life, liberty, or property, without due process of law."

The aforesaid judgment is in derogation of, and against the aforesaid title, right, privilege and immunity especially set up and claimed under the aforesaid Constitution, statute and authority.

In the trial court judgment was rendered for respondent. That judgment was affirmed by the Supreme Court of Missouri, and the motion filed by petitioner in said Supreme Court of Missouri petitioning for a rehearing was overruled, on the 11th day of July, 1921, and thereupon on said date, said judgment became a final one.

Wherefore, your petitioner respectfully prays that writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of Missouri, commanding said Court to certify and send to this Court, on the day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Supreme Court of Missouri in

the said case threin entitled, Elizabeth Van Zant, respondent, vs. The Kansas City Southern Railway Company, appellant, No. 21,819, to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the said judgment of the Supreme Court of Missouri and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

Geo. Crane
Arthur F. Smith
Attorneys for Petitioner.

State of Missouri, County of Jackson, ss:

A. F. Smith, of lawful age, being duly sworn, says that he is one of the counsel for and agent of The Kansas City Southern Railway Company, petitioner above named; that he assisted in preparing the foregoing petition and that the allegations thereof are true as he verily believes.

Arthur F. Smith

Subscribed and sworn to before me this 8th day of August, 1921.

M L Cullers
Notary Public, within and for Jackson County, Missouri.

My commission expires January 23, 1923

BRIEF FOR PETITIONER.

STATEMENT.

The facts are simple and practically undisputed. The respondent, Elizabeth Van Zant, together with her son, John M. Goodrich, constituted a family. The son was employed by the petitioner and from his wages supported his mother. Upon the request of the son, the railway company issued a free interstate pass to Mrs. Van Zant, good from Pittsburg, Kansas, to Howe, Oklahoma. This pass carried conditions on the back, (set out in full in the foregoing petition) which were assented to by Mrs. Van Zant by signing her name thereunder. Under these conditions she assumed all risk of accident and damage to person and baggage, and thereby released the company from liability therefor.

While making an *inter*state trip on this pass, she claims to have received injuries at a point in the State of Missouri, by falling from her seat into the aisle of the car, by reason of the jarring or jolting of the train, due apparently (although not certainly) to some derailment or wreck. There was no claim in the petition, and no evidence of willful or wanton negligence on the part of the railroad company.

Under the law of the state of Kansas where the pass was issued and the State of Missouri where the accident occurred, the conditions on the back of the pass are held to be void as against public policy. Under the decisions of the United States Supreme Court such stipulations are valid and constitute a complete defense.

The respondent had judgment for Eight Thousand ($8,000.00) Dollars in the trial court, which judg-

ment was affirmed in the Supreme Court of Missouri, and has now become final. The judgment was rendered on the theory that State instead of Federal law governed the conditions or stipulations of the pass.

THE FEDERAL QUESTION INVOLVED

Stated as simply as possible, the Federal question involved is, —Are the stipulations, exempting the carrier from liability, on a *free inter*state pass, issued under the provisions of the Hepburn Act of June 29, 1906, to be governed and controlled by Federal law and Federal decisions, or by the law of the state in which the passenger receives an injury while making an interstate trip on such pass?

It is the contention of the petitioner that the liability of the carrier under such circumstances is to be determined by Federal decisions, and that this Court has already held that such stipulations are valid.

> *Charleston, etc. Ry. Co.* v. *Thompson*, 234 U. S. 576.

The Missouri Supreme Court in its opinion plainly shows that a Federal question is involved. That Court said in its opinion:

> "Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, *therefore, these matters remain the subject of regulation by the several States.*" (Italics ours.)

If the petitioner is correct in its contention, then it was denied an immunity guaranteed it by the Con-

stitution and by Federal law. In any event this Court has never yet held that the "validity of stipulations or conditions" annexed to free interstate passes exempting the carrier from liability, still remain "the subject of regulation by the several States" as announced by the Supreme Court of Missouri.

The question involved affects the rights of thousands of members of families of employes of the carriers, and of the carriers themselves, and should not be left to uncertainty. For these reasons, it seems to us obligatory on this Court to take jurisdiction.

THE RULE OF THE FEDERAL DECISIONS GOVERNS

Before the Constitutional enactment relating to the issuance of free interstate passes by carriers, it had been well settled in this Court, as a matter of common-law interpretation, that stipulations on free passes exempting the carriers from liability, were valid and binding against the person receiving and using such pass and thereby assenting to said conditions.

U. P. Ry. Co. v. *Adams*, 192 U. S., 440;
Boering v. *Chesapeake, etc. Ry. Co.*, 193 U. S. 442.

In the Adams case, Mr. Justice Brewer, delivering the opinion of the court, said, l. c. 453:

> "The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger,

> he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege can not repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

The *Boering* case followed, adopted and approved the rule previously laid down in the *Adams* case.

Neither of these cases makes reference in any way to the Interstate Commerce Act, and therefore are announcements of this court's interpretation of the applicable common-law. But in the later case of *Charleston, etc. Ry. Co.* v. *Thompson*, 234 U. S. 576 (where the facts are exactly similar to those in the case at bar), the opinion deals with the conditions on a free interstate pass exempting the carrier from liability, issued *gratuitously* to the plaintiff under the Hepburn Act of June 29, 1906, just as was the pass in the present case. In the Thompson case, inasmuch as the validity of the stipulations exempting from liability had previously been held to be valid and not against public policy, the principal question under investigation for determination was whether or not the pass issued to a member of an employe's family was really a *free* pass, or was issued in part consideration of the services of the employe. The conclusion reached was that such pass was entirely *free* or gratuitous. Having reached this conclusion, a decision in favor of the carrier was easily reached. Mr. Justice Holmes writing the opinion, said:

> "As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this Court, *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440. *Boering* v. *Chesapeake, Beach Ry. Co.*, 193 U. S. 442. Judgment reversed."

It is to be observed that the opinion in the Thompson case does not even suggest the possibility that the liability of the carrier was to be determined by the law of the state where the injury occurred. From this it is plain that this Court had no doubt or question but that Federal law governed as to liability, in a case where the pass is interstate and is free or gratuitous.

This Court was again called upon to determine the force and effect of stipulations on a pass releasing the carrier from liability for negligence in the case of, *N. Y. Central Ry. Co.* v. *Mohney*, 252 U. S. 152.

In that case the question principally discussed was whether Mohney was making an *intra* or *interstate* trip. The injury occurred in the State of Ohio where such stipulations are held to be void. The majority of this Court held that Mohney was making an *intrastate* trip, and therefore the stipulations on the pass were properly interpreted and controlled by the law of the State of Ohio. Again there is no suggestion anywhere in this opinion that if Mohney's journey had been found to be *interstate*, the law of Ohio would have had any application to the release on the pass. Indeed it is clear that this Court in the Mohney case was of the opinion that whether the release clause was to be governed by State or Federal law depended on whether the journey was *intra* or *interstate*. Otherwise what point or purpose was there in ascertaining, as the Court did, whether the trip was interstate

or intrastate. If this Court had been of the opinion that the release clause was to be determined by the law of the State in which the accident happened, regardless of the character of the trip made, then it was doing a useless thing in analyzing the law and facts to determine whether the trip was *inter* or *intrastate*. Two of the Justices, Mr. Justice Day and Mr. Justice VanDeVenter announced in the Mohney case the exact proposition for which petitioner is contending. They said, page 158:

> "Being of the opinion that Mohney was using the annual pass in an interstate journey and that *to such a use of the pass the Ohio law was inapplicable.*" (Italics ours.)

We, therefore, confidently assert that the four decisions of this Court cited above show unmistakably that where the pass is absolutely gratuitous, as here, and is an interstate pass, and the holder is making an interstate journey thereon, then the stipulations are governed and controlled by *Federal* and not State law. In the case at bar this rule was not applied and therefore, petitioner has been denied a right to which it was entitled under the law, and this Court should issue its proper writ to correct the judgment of the State Court, and to announce clearly the true rule which is to govern in these cases.

We might appropriately terminate here this brief and these suggestions in support of the petition, because the right to review in this Court has been, we feel, clearly demonstrated. But a brief consideration of the reason given by the Supreme Court of Missouri for its judgment against petitioner may not be out of place.

The Legislation by Congress Is Sufficient to Take the Question Involved in This Case Away From State Regulation.

The State Court concedes that under the common law, as interpreted by the Federal Courts, the stipulations on this free pass are "valid and enforcible," but the State Court refused to apply the interpretation of the common law made by the Federal Court for the stated reason that the Congressional Legislation concerning the issuance of passes by carriers does not go far enough to place a question such as exists in this case, that is the validity of the release stipulation on the pass, under the operation of Federal law, but that such question is still one for State regulation. The language of the Supreme Court of Missouri being as follows:

> "Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States."

The error in this position of the State Court is in failing to recognize that the "necessary effect" of the legislation of Congress bringing the issuance of free interstate transportation under Federal Law and the operation of the Interstate Commerce Act is to likewise place under the operation of Federal Law *all questions* arising out of the issuance of such passes and to exclude the continuance of state power or state regulation with reference thereto. This applies just

as much to the *liability* arising in connection with the use of a free interstate pass as to the issuance of the pass itself.

It is hardly worth while to go extensively into the cases showing the many instances where state power is excluded after the subject matter has been brought under the operation of Federal Law. However, there are two classes of cases which are so closely analogous and which show so clearly that the question of liability is under Federal Law, where the *general* subject has been brought under that law, even though there is no express mention of liability in the Federal legislation, that it may be useful to point them out. These cases are:

(1) The Telegraph Cases.

(2) Decision of this Court as to assumption of risk in cases arising under the Federal Employers' Liability Act.

1. Telegraph Cases.

After the original Interstate Commerce Act was passed, Congress included telegraph companies among the carriers upon whom that act should operate. It declared them to be "common carriers within the meaning and principle of this Act." In Section 3 it prescribed for just and reasonable charges to be made by telegraph companies, made provision for classification of telegraph messages, and then subjected such companies to the same penalties for the *violation* of the Act as theretofore imposed upon other carriers. It will be noted that in the Federal Act there is nothing said in regard to the liability of telegraph companies for *failure to deliver messages promptly*—just as in the Federal legislation concerning the issuance of free transportation, nothing is said concerning the

measure of damages imposed upon the carrier, nor as to its liability for *failure to safely carry a passenger* using a free interstate pass issued under the provisions of the Act. The two omissions, if they can be so called, are in principle exactly the same. The business of a telegraph company is to send and deliver messages, just as the business of a passenger carrier is to transport passengers from one point to another. In neither instance is there in the Federal Act an attempt to specifically legislate with respect to liability in case of failure.

There existed and still exists in certain states statutory penalties imposed on telegraph companies for failure to make prompt delivery of messages, and because of the fact that in the Federal Act nothing was specifically said about the telegraph companies' liability for failure to so deliver messages, it was claimed that these statutes were still left in full force and effect and could operate on telegraph companies, even though a message sent was *interstate*. But that contention was decided to the contrary by this court, which held that *state power and state regulations were no longer operative.*

Western Union Telegraph Company v. *Brown*, 234 U. S. 542;

Telegraph Company v. *Lumber Company*, 251 U. S. 27 (reversing 116 Mississippi 660, where the control by the state law was asserted).

Telegraph Company v. *Boegli*, 251 U. S. 315 (reversing 187 Indiana, 238).

In the last case the Indiana court expressly held that the Act of Congress did not extend far enough to prevent the infliction of penalties by the states for failure to make prompt delivery of interstate messages.

But, again in this case (Boegli) the Supreme Court of the United States held that State law was excluded and that Federal Law applied, and, referring to its decision in *Telegraph Company* v. *Lumber Company* (*supra*), said that its ruling rested: (p. 317.)

> "Not alone upon the special provision of the Act of 1910, relating to unrepeated messages, *but upon the necessary effect of the general provisions of that Act, bringing Telegraph Companies under the control of the Interstate Commerce Act. The contention as to continuance of State power here made is to be adversely foreclosed.*"

These telegraph cases we think exactly support our contention in the present case and conclusively demonstrate the error of the Supreme Court of Missouri in its statement that the question of the carriers' liability to a passenger using a free interstate pass issued pursuant to the Act of Congress still "remains the subject of regulation by the several states." The Supreme Court of Missouri has itself bowed to and recognized the force of these Telegraph cases in excluding State regulation and the imposition of state penalties for failure to deliver interstate messages. *Leftridge* v. *Western Union Telegraph Co.*, 277 Mo. 90 (l. c. 97).

2. Assumption of Risk.

In the Federal Employers' Liability Act there is no express legislation as to liability or defenses that are open or available to the employer, except it is provided that neither contributory negligence nor assumption of risk shall be available to the Master where the proven negligence is a violation of a statute enacted for the safety or protection of the employee;

and that contributory negligence shall not be a complete bar to recovery, but only go in reduction of the damages. Under such legislation, it has been held from the beginning that the common law defense of assumption of risk (except as above stated) was available to the employer. The question then arose as to what rule of interpretation the doctrine of assumption of risk, when applicable as a defense, was to be tested or interpreted by—State or Federal. The State of Missouri through its Supreme Court took the position strongly that the doctrine of assumption of risk was to be applied in cases arising under the Federal Employers' Liability Act according to State law, and said in *Holloway* v. *Railway*, 276 Mo. 490 (l. c. 500), as follows:

> "The field is the liability of interstate carriers by rail for injuries to their employees and the enactment of the Federal law substituted it for all State laws on the same subject. The defense of assumption of the particular risk out of which the injury has grown having been left by the act untouched as it existed at common law, and full jurisdiction having been conferred upon the State courts for its enforcement, it follows that it must be determined and judicially enforced according to the common law existing in the State in which it accrued as if the act had not been passed. This is the doctrine distinctly announced by this court in *Fish* v. *Railroad*, 263 Mo. 106, 123, and *Williams* v. *Pryor*, 200 S. W. 53."

But through the channel of the last mentioned case, *Williams* v. *Pryor*, the question reached this court and is reported under the title "*Pryor, Receiver* v. *Williams*, 41 Sup. Ct. Reporter No. 4, page 36," and this Court decided exactly contrary to the Supreme Court of Missouri, and held that the doctrine of

assumption of risk was to be applied according to Federal Law and decisions, and not State, and for this express reason reversed and remanded the judgment of the Supreme Court of Missouri in *Williams* v. *Pryor*, (*supra*).

We therefore respectfully insist that, even if the question here involved had not been expressly decided in petitioner's favor, as it has in *Railway Co.* v. *Thompson*, 334 U. S., and *Railway Co.* v. *Mohney*, 252 U. S., still this Court, following its rulings and principles announced in the Telegraph cases and in *Pryor* v. *Williams*, would be obliged to hold that the question of liability to the holder and user of a free interstate pass was the subject of Federal regulation and control, and that State regulation was excluded.

From the foregoing we think it clear that the petitioner has been deprived of a right to which it is clearly entitled under Federal Constitution and law, and that this Court should accordingly grant its writ to correct and reverse the erroneous decision of the Supreme Court of Missouri denying such right.

Respectfully submitted,

Cyrus Crane

A. F. Smith

Attorneys for Petitioner.

F. H. MOORE,
RAY BOND,
Of Counsel.